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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JAMES EDWARD KING, Defendant and Appellant.	A079943 (Contra Costa County Super. Ct. No. 9608696)

On May 28, 1997, a jury returned a verdict finding appellant James Edward King guilty of murder with special circumstances, first-degree burglary, sodomy and attempted rape. The jury did not, however, find that appellant's crimes warranted the death penalty. The trial court accordingly sentenced appellant to life in prison without the possibility of parole consecutive to a determinate term of 30 years.

In appealing his conviction and sentence, appellant does not deny that he in fact committed the crimes. He contends, rather, that the jury's findings were based on inadmissible evidence; specifically evidence of Deoxyribonucleic acid ("DNA") profiling matching appellant's DNA profile with that of DNA recovered from the crime site, and evidence of statements taken from appellant after his arrest for the crimes.[1]

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part II.

[1] Appellant originally also contended that the trial court erred in admitting evidence of statistical probabilities calculated by means of the "unmodified product rule." After appellant filed his opening brief, the California Supreme Court decided *People v. Soto* (1999) 21 Cal.4th 512, holding such evidence to be admissible. Appellant accordingly concedes the point, and we do not address it further.

BACKGROUND

Appellant had been convicted of forcible rape in 1984, for which he served a term in state prison.[2] In January 1991, before appellant's release, and as required by former Penal Code section 290.2, appellant provided blood samples for analysis by a DNA laboratory operated by California's Department of Justice (the DNA Lab). The samples provided by appellant were analyzed, a profile was developed, and the profile placed in the DNA Lab's data bank.

On September 28, 1992, approximately nine months after appellant's release from prison, the body of 76-year-old Leticia Smith was found in the living room of her home. The cause of death was strangulation, apparently by means of a ligature fashioned from a pair of pantyhose. The victim had suffered blunt trauma injuries to her head and face, and it appeared that she had been sexually assaulted. Fluids from the victim's genital and anal area were collected and analyzed. The anal smears contained sperm.

The DNA Lab was not fully funded at that time, and no attempt was made to match the DNA recovered from the crime scene with profiles, such as that developed from the samples provided by appellant, maintained in the DNA Lab's data bank. In early 1995, however, samples of blood and sperm recovered from the crime scene were forwarded to the DNA Lab for analysis. Comparisons were made, and the profile of the DNA from the crime scene was found to match the DNA profile from the samples collected from appellant in 1991. Additional procedures were run on a semen stain recovered from the

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[2] The 1984 offense was not appellant's first brush with the criminal justice system. In 1971, while a juvenile, he exposed himself, an offense that resulted in his commitment to a boys' school. The following year, while on a good-conduct leave from the school, appellant raped a teacher in her classroom and stole $6 from her. The year after that, after receiving a one-hour pass from football practice, appellant went to a neighboring Veterans Administration hospital, where he attempted to rape a woman. Less than two years later he committed an offense that resulted in a conviction of rape, attempted rape and armed robbery. In October 1979, 19 months after his release from prison, appellant kidnapped a 16-year-old girl, raped her and forced her to orally copulate him. In 1984, he was convicted of forcible rape.

victim's bathrobe and on blood drawn from appellant in 1995. Again, the DNA profiles matched. There was evidence that the statistical likelihood that a Caucasian would have a particular profile is one in one-hundred and fifty trillion, that a Black person would have a particular profile is one in eight-hundred trillion and that an Hispanic person would have a particular profile is one in one-hundred and seventy trillion.[3/4]

Appellant was arrested on March 6, 1995. He was interrogated on the same day, and again on March 7, 1995. During the second day of interrogation, appellant essentially admitted that he had been in the home of the victim on the day of her murder, had struggled with her, and knew that he had injured her. He stated that he had no memory of any sexual assault.

DISCUSSION

I.

Appellant's Fourth Amendment Challenge to former Penal Code section 290.2

Former Penal Code section 290.2

Penal Code section 290.2, as in effect in 1991, required persons convicted of specified sex offenses, including rape, or of murder or felony assault and battery, and who were "discharged or paroled from" a "state prison, county jail, or any institution," to "provide two specimens of blood and a saliva sample." It provided that the blood should be withdrawn in a medically approved manner. It required the Department of Justice to perform a DNA analysis on the specimens, and provided that "DNA analysis and other genetic typing analysis" could be used only for law enforcement purposes. It authorized the Department of Justice to maintain a computerized data bank system for the purposes of filing DNA and other genetic typing information, and prohibited the inclusion of such

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[3] The likelihood that a particular profile would show up in the Department of Justice's data base also was calculated as one in one hundred and fifty billion, one in eight hundred billion and one in one hundred and seventy billion for Caucasians, Blacks and Hispanics, respectively.

information in the state summary criminal history information. The data could be collected only from the individuals convicted of the specified crimes or from crime scenes. Evidence taken from a crime scene was to be "stricken from the data bank when it is determined that the person is no longer a suspect in the case." (Pen. Code, § 290.2, subd. (d).) DNA or other genetic typing information could be disseminated only to law enforcement agencies and district attorney offices, or to defense counsel for defense purposes in compliance with discovery. (Pen. Code, § 290.2, subds. (e), (g).)

Penal Code section 290.2 was amended in 1993 to permit the use of samples by local public DNA laboratories, and to permit dissemination of genetic typing information to Department of Corrections parole officers and parole authority hearing officers. (Stats. 1993, ch. 457, § 1; Stats 1993-1994, 1st Ex. Sess., ch. 42, §§ 1, 2.) In 1996, Penal Code section 290.2 again was amended to change the time for providing samples from the time of release to the time of commitment to a specified institution. (Stats. 1996, ch. 917.) Penal Code section 290.2 was repealed in 1998, and reenacted, with modifications, in Penal Code section 295 et. seq. (Stats. 1998, ch. 696, § 2.) The new legislation has expanded the class of persons required to provide samples for DNA testing, and requires such persons to provide replacement specimens if the original samples prove to be unusable. (Pen. Code, §§ 296-296.2.) We, however, are not concerned with whether the state legitimately can require all such persons to provide samples, or whether persons who are not incarcerated may be required to provide samples or replace samples taken while they were in a penal institution. We determine only whether one such as appellant, imprisoned for having committed a crime involving a sexual assault, might be required to provide samples of blood and saliva for DNA analysis in accordance with the procedures outlined in former Penal Code section 290.2. It is noteworthy that although all 50 states have enacted laws comparable to California's DNA profiling laws, and although a number of other jurisdictions have considered the question of whether such laws violate Fourth Amendment

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4 For a complete discussion of DNA analysis, the methods used to obtain a DNA profile and theories determining statistical likelihood that a particular profile exists in a particular

principles, and have used any of several theories to resolve that question, appellant has been unable to cite any that has resolved it against DNA profiling.

The Fourth Amendment

It is not disputed that the non-consensual extraction of blood is an invasion of the rights protected by the Fourth Amendment of the United States Constitution.[5] It also is true that even less intrusive methods of collecting samples, and the ensuing chemical analysis of such samples to obtain physiological data, implicate Fourth Amendment privacy interests. (*Skinner v. Railway Labor Executives' Assn.* (1989) 489 U.S. 602, 616-617, and see *Schmerber v. California* (1966) 384 U.S. 757, 767.) It also is true, however, that to find the Fourth Amendment applicable to the procedures at issue here "is only to begin the inquiry into the standards governing such intrusions. [Citations.] For the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable." (*Skinner v. Railway Labor Executives' Assn., supra,* 489 U.S. at p. 619.)

Necessity of a Warrant Issued Upon Probable Cause

As a general rule, the question of whether a particular practice is unreasonable, and thus violates the Fourth Amendment, " 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.' " (*Skinner v. Railway Labor Executives' Assn., supra,* at p. 619, quoting from *Delaware v. Prouse* (1979) 440 U.S. 648, 654, and *United States v. Martinez-Fuente* (1976) 428 U.S. 543.) "Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." (*Bell v. Wolfish* (1979) 441 U.S. 520, 559.)

Appellant contends, however, that it is improper to engage in such a balancing test here. His position is that the general rule is that a search may be initiated only after a

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population, see *People v. Soto, supra,* 21 Cal.4th at pp. 519-526.

[5] The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

warrant has been issued upon probable cause, and that a court should engage in the balancing test only if it first determines that the case falls within a recognized exception to the general rule. Appellant's contention is developed from language in *Skinner v. Railway Labor Executives' Assn., supra*, 489 U.S. at page 619, where the court, after recognizing the need to balance the relevant interests, found: "In most criminal cases, we strike this balance in favor of the procedures described by the Warrant Clause of the Fourth Amendment. [Citations.] Except in certain well-defined circumstances, a search or seizure in such a case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause. [Citations.] We have recognized exceptions to this rule, however, 'when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." ' [Citations.] When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context. [Citations.]" The "special needs" exception was again recognized by the Supreme Court in *Treasury Employees v. Von Raab* (1989) 489 U.S. 656, 665-666: "[O]ur cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context."

According to appellant, the DNA testing here is done only to further the "normal need for law enforcement." It follows that neither the "special needs" exception, nor any other recognized exception to the warrant and probable cause requirement exists, and it therefore is unnecessary and improper to engage in a balancing of the competing interests. We disagree. Cases such as *Skinner* and *Von Raab* do no more than recognize that the competing interests do not vary in the vast majority of Fourth Amendment cases; i.e., in most criminal investigations. It therefore is unnecessary in "most criminal cases" to balance the competing interests, because the balance in such cases already has been struck in favor of the procedures described by the Warrant Clause of the Fourth Amendment. The

circumstances in cases such as *Skinner* and *Von Raab,* however, or in the other recognized "exceptions," are significantly different from those in a typical criminal investigation. The balance that has been struck in "most criminal cases," therefore, is not necessarily the balance that should be struck in these cases. The Supreme Court in *Vernonia School Dist. 47J v. Acton* (1995) 515 U.S. 646 – another "special needs" case, explained: "As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.' At least in a case such as this, where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted, whether a particular search meets the reasonableness standard ' "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." ' [Citations.]" (*Id.* at pp. 652-653, fn. omitted.)

The typical criminal case is one where a crime has been committed, an investigation has been initiated and the investigators are attempting to gather evidence for the purpose of solving a particular crime or to build a case against a particular individual. The investigators exercise great discretion, deciding who to investigate, how to conduct that investigation, and what, if anything, should be seized as evidence. At the very least, such searches inconvenience involved persons. There also is a substantial likelihood that such a search will generate fear and surprise in persons who, as a result of the search, reasonably may believe that they have become the focus of a police investigation. This is not the situation, however, when the "search" is the securing of blood and saliva samples for DNA analysis and profiling. The samples are not taken as part of an investigation of a particular crime. The decision to obtain a sample from a particular person is not subject to official discretion. There is no focus on a particular person. As those who are required to provide samples doubtless know, every person of the specified class is required to provide a sample. The person supplying the samples therefore has no reason to fear that the intrusion suggests a belief by the authorities that he or she has committed any criminal offense, or that he or she may be subjected to any further investigation. The fact that the person is

already incarcerated also tends to reduce the inconvenience of having to go to a particular place to provide samples.

There is little reason to require a warrant in such circumstances. A judicial warrant is a necessary component of the "normal need for law enforcement," because it protects privacy interests "by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents. A warrant assures the citizen that the intrusion is authorized by law, and that it is narrowly limited in its objectives and scope. [Citations.] A warrant also provides the detached scrutiny of a neutral magistrate, and thus ensures an objective determination whether an intrusion is justified in any given case." (*Skinner v. Railway Labor Executives' Assn., supra*, 489 U.S. at pp. 621-622; and see also, *Treasury Employees v. Von Raab, supra,* 489 U.S. at p. 666.) A warrant, however, provides little or no additional protection to personal privacy when, as in the present case, the circumstances justifying the testing and the permissible limits of the intrusion are defined narrowly and specifically, these circumstances doubtless are well-known to those in the class of persons to be tested, and the decision to test is not discretionary and thus is not based on a judgment that certain conditions are present. In such circumstances "there are simply 'no special facts for a neutral magistrate to evaluate,' " and it is reasonable to dispense with the warrant requirement. (*Treasury Employees v. Von Raab, supra,* 489 U.S. at p. 667; and see *Skinner v. Railway Labor Executives' Assn., supra,* 489 U.S. at p. 622.)

It still is true that as a general rule, even a warrantless search must be conducted only on probable cause to believe that the person searched has violated the law, or at least there must be some quantum of individualized suspicion before it can be concluded that a search is reasonable. (*Skinner v. Railway Labor Executives' Assn., supra,* 489 U.S. at p. 624.) Nonetheless, "We made it clear. . . that a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable. [Citation.] In limited circumstances, where the privacy interests implicated by a search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite

the absence of such suspicion." (*Id.* at p. 624; and see *Vernonia School Dist. 47J v. Acton, supra,* 515 U.S. at p. 653.) Such circumstances exist here.

Although prisons are not beyond the reach of the constitution, "it is also clear that imprisonment carries with it the circumspection or loss of many significant rights." *Hudson v. Palmer* (1984) 468 U.S. 517, 523-524.) The nature of confinement necessarily results in a significant reduction in the expectation of privacy. It is settled, for example, that prisoners have no privacy interests in their cells. (*Id.* at p. 526.) Even pretrial detainees can have no reasonable expectation of privacy with respect to their rooms or cells. (*Bell v. Wolfish, supra,* 441 U.S. at p. 557.) The privacy interests of inmates in their own bodies bow to the interests of prison officials in ensuring that weapons or contraband are not brought into prison institution, and inmates therefore may be required to expose their body cavities for visual inspection as part of a strip search conducted after every contact visit with a person from outside the institution. (*Id.* at p. 560.) Persons convicted of sex offenses are required to provide blood samples for purposes of testing for acquired immune deficiency syndome (AIDS). (Pen. Code, § 1202.1.) Probationers enjoy only conditional liberty properly dependent on observance of special probation restrictions, and their homes are subject to warrantless searches on less than probable cause. (*Griffin v. Wisconsin* (1987) 483 U.S. 868, 873-875.)

The reduction in a convicted person's reasonable expectation of privacy specifically extends to that person's identity. Indeed, not only persons convicted of crimes, but also those merely suspected of crimes, routinely are required to undergo fingerprinting for identification purposes. As to convicted persons, there is no question but that the state's interest extends to maintaining a permanent record of identity to be used as an aid in solving past and future crimes, and this interest overcomes any privacy rights the individual might retain. "This becomes readily apparent when we consider the universal approbation of 'booking' procedures that are followed for every suspect arrested for a felony, whether or not the proof of a particular suspect's crime will involve the use of fingerprint identification. Thus a tax evader is fingerprinted just the same as a burglar. While we do not accept even this small level of intrusion for free persons without Fourth Amendment

constraint [citation], the same protections do not hold true for those lawfully confined to the custody of the state." (*Jones v. Murray* (4th Cir.1992) 962 F.2d 302, 306; and see *Rise v. State of Oregon* (9th Cir. 1995) 59 F.3d 1556, 1559-1560 and *People v. Wealer* (Ill.App. 2 Dist. 1994) 636 N.E.2d 1129, 1136-1137.) The fingerprints, photographs and physical descriptions of convicted persons are preserved as a matter of routine. And once an individual has been convicted of a crime or crimes, and has been incarcerated in a penal institution, his or her identity clearly becomes a matter of interest to prison officials. It further is true that sex offenders such as appellant are required to register annually with the police for the remainder of their lives. (Pen. Code, § 290.) "The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as 'legitimate.' [Citation.] What expectations are legitimate varies, of course, with context [citation], depending, for example upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park." (*Vernonia School Dist. 47J v. Acton, supra,* 515 U.S. at p. 654.) By their commissions of a crime and subsequent convictions, persons such as appellant have forfeited any legitimate expectation of privacy in their identities. In short, any argument that Fourth Amendment privacy interests do not prohibit gathering information concerning identity from the person of one who has been convicted of a serious crime, or of retaining that information for crime enforcement purposes, is an argument that long ago was resolved in favor of the government.[6]

On the other hand, the government has an undeniable interest in crime prevention. It has interests in solving crimes that have been committed, in bringing the perpetrators to justice and in preventing, or at least discouraging, them from committing additional crimes. The government also has an interest in ensuring that innocent persons are not needlessly

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[6] Appellant voices concerns that once DNA profiling is permitted for one purpose, it creates the possibility of misuse and makes it that much easier to permit DNA profiling for other purposes. It is enough that former section 290.2 limited the use of DNA evidence, prohibiting its use for anything other than law enforcement purposes. Whether it constitutionally might be used for some other purpose is a question that is not before us.

investigated – to say nothing of convicted – of crimes they did not commit.[7] DNA testing unquestionably furthers these interests. The ability to match DNA profiles derived from crime scene evidence to DNA profiles in an existing data bank can enable law enforcement personnel to solve crimes expeditiously and prevent needless interference with the privacy interests of innocent persons. It has been suggested that DNA profiling may act as a deterrent to future criminal activity. (*Roe v. Marcotte* (2d Cir. 1999) 193 F.3d 72, 79.) It also is an unfortunate truth that many offenders commit more than one crime, and recidivism is common. (See *Jones v. Murray, supra,* 962 F.2d at p. 306, taking notice of studies establishing the probability that persons arrested for serious crimes have committed past crimes and the statistical likelihood that such persons will commit crimes in the future.) Speedy identification and apprehension of an offender, therefore, will prevent crime even if DNA testing has no deterrent effect on criminal activity.

The Supreme Court in *Skinner, Von Raab, Vernonia*, and also in *New Jersey v. T. L. O.* (1985) 469 U.S. 325, concluded that the usual requirements of a judicial warrant issued upon probable cause were not applicable because the intrusion on privacy interests in those cases was less than that involved in most criminal cases and the governmental interest involved "special needs beyond the normal need for law enforcement." We do not believe, however, that these cases stand for the proposition that the "usual requirements" apply in all other cases. In *Michigan Dept. of State Police v. Sitz* (1990) 496 U.S. 444, for example, the court upheld a sobriety checkpoint program that required authorities to stop all vehicles passing through a checkpoint, and briefly to examine their drivers for signs of intoxication. The magnitude of the drunken driving problem coupled with the slight intrusion on motorists stopped briefly at sobriety checkpoints justified a departure from the

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[7] The Legislature has expressed the purpose of the DNA testing procedures as "to assist federal, state, and local criminal justice and law enforcement agencies within and outside California in the expeditious detection and prosecution of individuals responsible for sex offenses and other violent crimes, the exclusion of suspects who are being investigated for these crimes, and the identification of missing and unidentified persons, particularly abducted children." (Pen. Code, § 295, subd. (c).)

requirement of a warrant on particularized suspicion. (*Id.* at p. 451.) These cases, and others, teach that the relevant inquiry is not whether the circumstances of a particular search fall within the specific "exception" to ordinary Fourth Amendment requirements recognized in an individual case, but whether the privacy interests and the governmental interests at stake so differ from those involved in normal law enforcement, that they justify a departure from the established requirement of a judicial warrant issued upon probable cause.

It therefore is unnecessary to determine if the taking of samples for DNA analysis might be deemed to answer to "special needs," beyond the normal need for law enforcement (see *Roe v. Marcotte, supra,* 193 F.3d at p. 79 and *State v. Olivas* (Wash. 1993) 856 P.2d 1076, 1086 (majority opinion)), or if it presents a separate category of search to which the per se requirement of probable cause does not apply. (See *Jones v. Murray, supra,* 962 F.2d at pp. 306-307, including footnote 2 and *People v. Wealer, supra,* 636 N.E.2d at pp. 1134.) What is significant is that the taking of blood and saliva samples for DNA analysis is not the kind of a search that was either approved or disapproved at the time the Fourth Amendment was enacted, that such a taking differs in fundamental ways from searches undertaken in "most criminal cases," and that whatever privacy interest persons such as appellant retain in their identities is far less than that of persons subject to searches and seizures in the course of ordinary law enforcement. Because of these fundamental differences, it would be improper blindly to adopt the balance struck in connection with most criminal cases. (See *Landry v. Attorney General* (Mass. 1999) 709 N.E.2d 1085, 1091-1092; *Rise v. State of Oregon, supra,* 59 F.3d at p. 1559; and *People v. Wealer, supra,* 636 N.E.2d at pp. 1134-1135.) Whether the DNA testing procedures pass muster under the Fourth Amendment should be determined by balancing their intrusion on the individual's privacy interests against their promotion of legitimate governmental interests. And in determining if the balance permits warrantless, suspicionless testing, we consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. (See

People v. Wealer, supra, 636 N.E.2d at p. 1135, and concurring opinions in *People v. Olivas, supra,* 856 P.2d at pp. 1091-1092 and *Jones v. Murray, supra,* 962 F.2d at p. 313.)

Application of the Fourth Amendment's Balancing Test

We already have considered both the privacy interests and the governmental interests at stake in the taking of samples for DNA analysis. As discussed above, the privacy interests are minimal – considerably less than those at stake in the ordinary criminal investigation. The governmental interests furthered by the intrusion required by DNA analysis unquestionably are important; arguably even greater than those at stake in "normal law enforcement," because of their potential to solve and prevent large numbers of crimes, and to protect innocent persons from needless investigation.

The scope of the intrusion authorized by former section 290.2 is not great. In *Skinner v. Railway Labor Executives' Assn., supra,* the Supreme Court, although recognizing that breath, blood and urine tests certainly are an intrusion, concluded that when the tests are performed on employees, the intrusion is minimized by the fact that the employment context already limits the movements of employees. "Ordinarily, an employee consents to significant restrictions in his freedom of movement where necessary for his employment, and few are free to come and go as they please during working hours. [Citation.] Any additional interference with a railroad employee's freedom of movement that occurs in the time it takes to procure a blood, breath, or urine sample for testing cannot, by itself, be said to infringe significant privacy interests." (*Skinner v. Railway Labor Executives' Assn., supra,* 489 U.S. at pp. 624-625.) Prisoners, of course, have far less freedom of movement than employees and, accordingly, the interference with that interest resulting from a requirement that they provide blood and saliva samples is further reduced. The court in *Skinner* also considered the nature of blood tests, noting that "the intrusion occasioned by a blood test is not significant, since such 'tests are a commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and for most people the procedure involves virtually no risk, trauma or pain.' [Citing *Schmerber v. California, supra,* 384 U.S. at p. 771.] . . . *Schmerber* thus confirmed 'society's judgment that blood tests do not constitute an unduly

extensive imposition on an individual's privacy and bodily integrity.' [Citations.]" (*Skinner v. Railway Labor Executives' Assn., supra*, 489 U.S. at p. 625.) Moreover, again, persons such as appellant already are subject to blood tests for purposes of testing for AIDS. Again, the intrusion caused by the testing here is less than overwhelming.

As discussed earlier, the reasons for requiring a warrant do not exist here because there is no discretion on the part of the officials who take the samples, and little or no potential for surprise on the part of those required to provide samples. For similar reasons, the nature of the intrusion on persons such as appellant is reduced. As pointed out by the court in *United States v. Martinez-Fuente, supra,* 428 U.S. 543, 558, approving highway checkpoints for detecting illegal aliens, the intrusion on any particular individual stopped and searched is minimized by the fact that he or she can see that others also are being stopped and searched, and thus the likelihood of fear or annoyance is reduced. (And see, also, *Michigan Dept. of State Police v. Sitz, supra,* 496 U.S. at pp. 452-453.)

The final question is the efficacy of DNA testing as a means for meeting the governmental interests at stake. (*Vernonia School Dist. 47J v. Acton, supra,* 515 U.S. at p. 660.) There is no question but that by providing an effective means of identification, DNA testing is an efficient means of promoting the governmental interests at stake.

In sum, we conclude that the procedures outlined there do not violate the Fourth Amendment.

II.

Admission of Appellant's Statements

Appellant's Statements

Appellant was arrested on the morning of March 6, 1995. The police advised him of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436, 478-479. Appellant stated that he understood them, but that he nonetheless wished to make a statement. He denied any involvement in the crime, denying that he knew the victim or had any reason to be in the vicinity of her home at the time she was killed. The interviewing detectives told appellant that blood samples provided by him while in prison tied him to the crime. Appellant insisted that the evidence must be wrong, expressing concern that the police already had

determined that he was the offender. Appellant agreed to take a polygraph examination so as to clear himself from suspicion.

Appellant was transported from the Richmond police station to the Contra Costa District Attorney's Office in Martinez, arriving at approximately 1:20 p.m. An investigator with the District Attorney's Office, who also conducted the polygraph examination, interviewed him there. The investigator told appellant that beyond all doubt he had "failed the test." The investigator then urged appellant to tell the truth and admit his involvement. Appellant listened, but stated that he wanted some time to himself, asking the investigator to get the police detectives and have them take him wherever they were going to take him. The investigator ignored appellant's request, insisting that appellant had in fact committed the crimes, suggesting that appellant must have acted under some kind of irresistible compulsion and imploring him to admit to the crimes so that he could get help. Appellant refused to admit to any involvement, repeatedly asking the investigator to let him go and stating that he needed to rest. The investigator did not honor appellant's requests, but continued to talk to appellant, stating that he could sympathize with appellant if he was involved in a situation that got out of control, not if appellant planned, deliberated and schemed about taking a life. Appellant replied, "Man, I didn't deliberately do nothing to nobody. . . . It wasn't planned." The investigator then, finally, brought in the police detectives. They told appellant to "[s]it down a minute," and continued to talk to him, again pointing out that the physical evidence and the polygraph examination tied him to the crimes. Appellant made noncommittal responses, stating that he did not want to talk further. Finally, in response to the repeated requests for an explanation, appellant stated, "Let me get on my way and you will get all that, okay?" The officers made certain that appellant had the means of contacting them. They finally permitted appellant to leave, at approximately 6:00 p.m., after securing his "word" that he would speak with them again.

Appellant was then returned to the Richmond Police Department, where he spent the night. The following morning, March 7, 1995, after the prisoners had been served breakfast, the police detectives called the jailer, asking him to tell appellant that they were in. A few minutes later the jailer called, telling the detectives that appellant wished to talk

to them. Appellant asked for a cup of coffee and a cigarette, and then abruptly stated, "I didn't sodomize this lady. . . . I didn't sodomize this lady. I did not enter into that lady's body no kind or way or shape or form or fashion. I don't know how that came about. I don't know. I don't know what happened, either. It just happened. . . . And I was under the influence that day." The detectives asked, and appellant agreed, that when they left off the previous day, appellant had indicated that he wished to talk to them, but wanted to get some sleep and food. He also agreed that when he saw the jailer that morning he expressed the desire to speak further with the detectives. The police did not re-admonish appellant with the *Miranda* warnings, but reminded appellant of them. Appellant stated that he remembered the previous day's admonishments, but still wished to talk.

Appellant told the police that he had been staying in a men's shelter a couple of miles from the victim's home. He spent some time in her neighborhood, however, working and also using drugs. Appellant had a roofing job in the neighborhood. He met the victim when he noticed that a lot of trash and paper, presumably from his work site, had blown into her yard, and went over to help her clean it up. He was at the work site for approximately a week, during which he spoke to the victim a couple of times and used her telephone to call his boss. On the day of the crimes, appellant had returned to the work site to do some touch up work. He smoked cocaine throughout that morning and into the afternoon. He saw the victim walk to her house with a bag of groceries in the early afternoon. Some time later he knocked on her door, asking if he could use her telephone again to call his boss. The victim let him in. She was wearing a bathrobe. Appellant stated that he remembered sitting on a chair to use the telephone. He remembered removing a pair of pantyhose from the chair, but did not remember much of anything after that. He recalled that there was a struggle and that the victim fell back in the chair and then onto the floor, hitting her head in the process. He noticed that she wasn't wearing anything under her robe and attempted to cover her up. He told her he was sorry, and then he left. After he left, appellant smoked some more crack cocaine, and then returned to the shelter. He did not remember having sex with the victim, although he also stated that he thought that sex was what the whole thing was about. The police then asked appellant again if he had understood his rights, and he agreed that he had.

They asked if they had done anything to threaten or coerce him to make the statements. He replied that they had not. Appellant then asked to speak again to the District Attorney's investigator.

Appellant was taken to the investigator, and thereafter discussed the crimes with him, with a psychologist, and again with the police detectives.

The trial court, which not only had reviewed transcripts of the various interviews with appellant, but had looked at videotapes of those interviews, excluded all of appellant's March 6 statement occurring after the District Attorney's investigator first told him that he had failed the polygraph test, finding that that portion of appellant's statement occurred after he had stated his desire to leave and to stop speaking. The court found that appellant himself initiated the March 7 interview with the police detectives, and that he was aware of his rights. The court found that the March 7 interview was not so tainted with the improper conduct from the previous day as to render appellant's statements inadmissible. In so finding, the court pointed out that appellant requested to speak to the detectives after breakfast, after having a night's rest and after having a period for reflection. Appellant also was aware that on the previous day he was permitted to leave after expressing his desire to stop speaking – albeit not right away. The court pointed out that appellant, in "a calm, matter-of-fact way," acknowledged that he knew the rights that had been explained to him on the previous day, and that he was experienced with the criminal justice system, having suffered a number of prior arrests and convictions. Appellant agreed that he had not been coerced or threatened, and that no promises had been made to him. The court accordingly admitted appellant's March 7 interview with the police detectives. It excluded the later statement made by appellant to the District Attorney's investigator, however, finding that the investigator's conduct during that interview exceeded the bounds of reasonable interrogation.

Appellant contends that the trial court erred in admitting into evidence his March 7 statement to the police detectives.

Admissibility

A defendant has the right to remain silent. (*Miranda v. Arizona, supra,* 384 U.S. at p. 480.) A defendant also, however, has the power to waive that right and agree to make a statement. (*Id.* at pp. 478-479.) The issue here is whether appellant's decision to make a statement was the result of his own free will, or whether it was the result of improper coercion by the police. " '[I]f he has willed to confess, it may be used against him. If [he has] not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.' " (*People v. Montano* (1991) 226 Cal.App.3d 914, 934, citing *Culombe v. Connecticut* (1961) 367 U.S. 568, 601-602.)

" 'In considering a claim that a statement was inadmissible because it was obtained in violation of a defendant's rights under *Miranda v. Arizona, supra,* 384 U.S. 436, we accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. [Citation.] Although we independently determine whether, from the undisputed facts and those properly found by the trial court, the challenged statements were illegally obtained, [citation] we " 'give great weight to the considered conclusions' of a lower court that has previously reviewed the same evidence.' [Citations.]" (*People v. Whitson* (1998) 17 Cal.4th 229, 248.)

It is not fatal that the police did not re-*Mirandize* appellant on March 7. Appellant had been advised of his rights on March 6. His response indicated that he was perfectly familiar with them and was willing to talk. This familiarity was not surprising, given appellant's long-time involvement with the criminal justice system and his numerous arrests and convictions. He was interviewed the following morning, in the same room and by the same detectives that had interviewed him the previous day. After being reminded of the rights explained to him the previous day, he indicated that he was familiar with them but still wished to talk. Under the circumstances, readvisement was not necessary. Considering the "totality of the circumstances," we, like the trial court, conclude that appellant was fully aware of the rights he was giving up when he decided to speak with the detectives on March 7. (See *People v. Mickle* (1991) 54 Cal.3d 140, 170.)

The more difficult question is whether appellant's waiver was truly *voluntary*. Appellant's position is that the conduct of the District Attorney's investigator was coercive,

that appellant invoked the right to remain silent, that the police ignored that invocation and impermissibly continued to question him and that the March 7 interrogation was merely a continuation of the improper interrogation of March 6.

The claim that appellant invoked the right to remain silent is something of a red herring. Appellant did not refuse to speak with the police; to the contrary, he appeared to be quite willing to speak with them and quite willing to speak with the District Attorney's investigator. Even when he stated that he did not wish to talk further, and asked to be "let go," appellant's request, in context, was not so much an invocation of the right to remain silent as a request to postpone any further discussion until he had the opportunity to rest and get something to eat. He confirmed this interpretaion of his motive the following day, agreeing that he had indicated to the detectives that he wished to speak with them, but only after resting. (See *People v. Bolden* (1996) 44 Cal.App.4th 707, 712-713, recognizing that a request to talk "later" is not the same thing as an invocation of the right to remain silent.)

It is, however, troubling that the investigator and detectives continued to question appellant on March 6, notwithstanding his expressed desire that questioning cease, and that they stopped the questioning only after appellant stated that "It wasn't planned," "Let me get on my way and you will get all that, okay?" and only after he gave his "word" to speak with them again. The record, accordingly, raises the inference that appellant was responding to coercive police conduct by saying whatever needed to be said in order to be permitted to leave. The court, as noted, ruled that appellant's responses were inadmissible, but it did admit the statement made by him the following day. When a defendant's statement, although following coercive police conduct was not made in direct response to the coercive conduct, the inquiry is whether the statement was sufficiently the product of appellant's free will as to purge the primary taint of the illegality of the coercive conduct; i.e., whether "the connection between the [first interrogation] and the confession 'had "become so attenuated as to dissipate the taint." ' " (*People v. Beardslee* (1991) 53 Cal.3d 68, 108; citing *Wong Sun v. United States* (1963) 371 U.S. 471, 491.)

Once it is established that coercive police conduct had occurred, the burden shifts to the prosecution " 'to prove that the taint has been "purged" and hence that the evidence is

admissible in spite of the primary illegality. [Citations.]' [Citation.]" (*People v. Beardslee, supra,* 53 Cal.3d at p. 108.) The question of whether that burden has been met and a confession shown to be the product of free will, must be answered on the facts of each case. "No single fact is dispositive . . . . The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of [the illegality]. But they are not the only factor to be considered. The temporal proximity of [the illegality] and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct are all relevant.' [Citations.]" (*Id.* at pp. 108-109.)[8]

It is quite clear that appellant was well aware of his right to remain silent and of the consequences that would attend a confession. Although the police conduct was coercive, appellant appeared to be perfectly able to resist that coercion, maintaining his non-involvement with the crime throughout the March 6 interview. Even his words that "It wasn't planned," and "Let me get on my way and you will get all that, okay," are hardly admissions. Thus, there was no particular reason for appellant to have felt after the March 6 interview that he irrevocably had " 'let the cat [of his guilt] out of the bag.' " (*People v. Montano, supra,* 226 Cal.App.3d at p. 938.[9])

The police did not themselves go to appellant on March 7, but sent the jailer to tell appellant that they were there, intimating that appellant could, if he wished, choose not to see them. Appellant had been given food and rest, and upon his request, the police provided

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[8] We agree with appellant that where, as here, a confession follows coercive conduct by the police, it is necessary to look beyond the question of whether appellant himself initiated the March 7 contact with the police. (See *People v. Montano, supra,* 226 Cal.App.3d at pp. 932-934.)

[9] *People v. Montano* is also distinguishable because the appellant in that case was a hung over 18-year old illegal immigrant who apparently never before had been interrogated and who was questioned throughout the night following his arrest. His repeated assertions that he did not want to talk were ignored by the police, until he finally made admissions tantamount to a confession. Although the defendant himself initiated a second contact with the police, he did so only a few hours later, before he could have received much rest, and he did so on the reasonable belief that he already had in effect admitted to the crime.

him with coffee and cigarettes. He was acquainted with one of the detectives; indeed, he was comfortable enough with him to say that it looked as though the detective had been gaining weight. Appellant admitted his complicity in the crime before any question was asked, indicating that he had decided to speak before meeting with the detectives and after having reflected on the matter. Appellant's statements also indicate a conscious determination to confess, and, as the trial court noted, appellant's demeanor throughout was calm and matter-of-fact.

In short, after independently reviewing the record, we conclude that appellant's confession was a product of his own free will. Appellant's March 7 statement to the detectives, therefore, properly was admitted. We also conclude, however, that in light of the physical evidence of injuries to the victim and the DNA evidence tying appellant to those injuries, there was no real question as to what crimes had been committed or as to who had committed them. Any error in admitting appellant's statements was harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306-309; *Chapman v. California* (1967) 386 U.S. 18, 23; *People v. Cahill* (1993) 5 Cal.4th 478, 509-510.)

Conclusion

The judgment is affirmed.

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Stein, J.

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Strankman, P.J.

_____
Swager, J.

Trial Court:	Superior Court Contra Costa County
Trial Judge:	Honorable James J. Marchiano
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